Filed 3/30/10 In re L.L. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re L. L., a Person Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES, Plaintiff and Respondent, v. A. G. et al., Defendants and Appellants.	C061903 (Super. Ct. No. JD228591)

Appellants A.G., the mother, and L.L., Sr., the father of the minor L.L., appeal from the juvenile court's orders denying their petitions for modification (Welf. & Inst. Code, § 388, subsequent section references are to this code) and terminating their parental rights (§§ 395, 366.26). Appellants contend it was an abuse of discretion to deny their petitions, and the father contends the juvenile court should have applied the

parent-child relationship exception to terminating parental rights, and there was a failure to comply with the notice provisions of the Indian Child Welfare Act (ICWA). We shall affirm.

BACKGROUND

The minor was detained at his birth in October 2008 after testing positive for cocaine. The mother displayed extreme emotions of anger and paranoia, tested positive for cocaine in September 2008, and left the hospital against medical advice. The father was arrested in September 2008 for domestic violence against the mother.

The Sacramento County Department of Health and Human Services (DHHS) filed a dependency petition pursuant to section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling), alleging the mother's substance abuse problem, and that her parental rights to two of the minor's half-siblings were terminated in February 2008. The petition was later amended to include domestic violence and substance abuse allegations against the father.

The father was incarcerated pending charges of corporal injury on a spouse or cohabitant. (Pen. Code, § 273.5.) At the November 2008 detention hearing, counsel for the father informed the juvenile court that the father was incarcerated and expected to be released around December 1. Counsel requested visitation while in custody or a visitation order upon his release. The juvenile court detained the minor, and issued a no contact order

for the father with visitation after his release. The father was not released from jail until February 4, 2009.

The 22-year-old mother admitted having a cocaine problem since she was 20, and to using it daily while pregnant. She met the father through their addiction; most of the domestic violence took place when they were high. She planned to be with the father upon his release.

The mother has a lengthy child welfare history. In May 2006, the juvenile court sustained petitions regarding the minor's half-siblings S.S. and I.S. due to the mother's emotional problems. The mother's services in the prior case included substance abuse treatment and Drug Court. Reunification services were terminated in 2007, and parental rights were terminated in February 2008.

In an interview by a social worker, the father denied the domestic violence and substance abuse allegations, claiming he had not used drugs since entering Proposition 36 probation in February. His extensive criminal record contains felony convictions dating back to 1971, and 13 drug-related convictions since 1986, including a 2008 conviction for using or being under the influence of a controlled substance. (Health & Saf. Code, § 11550.)

The mother denied Indian heritage, while the father initially claimed Indian heritage with an unknown tribe. The father later said his tribal heritage was either unknown or possibly Blackfeet, and identified the paternal great-

grandmother as an Indian parent.[1] DHHS notified the Bureau of Indian Affairs (BIA) and the Blackfeet Tribe of the father's claim in November 2008. The notice included an Indian ancestry questionnaire completed by father. The father subsequently informed DHHS that the notice was incorrect as it did not indicate possible Blackfeet tribal heritage for the paternal great-grandmother. DHHS sent a letter to the Blackfeet Tribe and the BIA relating the paternal great-grandmother's alleged Blackfeet heritage. The Blackfeet Tribe later replied that the minor and the parents did not have tribal heritage.

The juvenile court sustained the amended petition in December 2008, and found the minor was not an Indian child under the ICWA. Services were terminated pursuant to section 361.5, subdivision (b)(10), (11), and (13), and the juvenile court set a selection and implementation hearing. (§ 366.26.)

The father filed a petition for modification in April 2009, seeking reunification services. The petition alleged he was participating in: weekly individual and group counseling, regular visits with the minor, parenting classes, marriage counseling with the mother at his church, and weekly drug testing through his probation officer. The mother filed a similar petition for modification later that month. She also

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[1] The father actually referred to the Blackfoot Tribe, which is not a federally recognized tribe. However, the Blackfeet Tribe is (68 Fed.Reg. 68180 (amended Dec. 5, 2003)[listing the "Blackfeet Tribe of the Blackfeet Indian Reservation of Montana"]), and DHHS treated the father's claim as raising possible Blackfeet heritage.

filed documentary evidence of her participation in counseling, completing her parenting classes, visits with the minor, and negative drug tests.

The parents were visiting the minor one hour a week as of April 2009. They were attentive to the minor, held him, talked to him, fed him, and changed his diapers. The parents showed great love and affection for the minor, who appeared to recognize them. The visits ended without incident, and the minor easily transitioned to his foster parents.

The current foster parents were not committed to adoption. However, the minor had an adult paternal half-sister in Arizona who was committed to adopting him, and approved for placement.

At a combined hearing on the petitions for modification and section 366.26 hearing, the father testified that he participated in individual counseling, where he addressed anger management, domestic violence, the history of drug abuse, life skills, and recovery. In group counseling, he learned to take responsibility for his son being with Children's Protective Services.

The father was a recovering cocaine addict, who last used the drug on September 10, 2008. He voluntarily entered drug treatment in February 2009, two days after his release from jail, and expected to complete the program in August. The father has a sponsor, and is on the second step of his twelve-step program. He previously failed Proposition 36 drug treatment because he was too busy trying to get high. Even if he does not reunify, the father will continue with recovery.

The father lives with the mother, and they will marry later in the month. They visit the minor for two hours, once a week, where he plays with the minor, takes care of him, and puts him to sleep. The father enjoys the visits, but cries, because he feels responsible for the minor not being with him.

The mother testified that she used cocaine in the past but now attends Narcotics Anonymous meetings three to four times a week. She has a sponsor, and is on step one of her twelve-step program. Her sobriety date was September 10, 2008, and she has not used drugs since then. She graduated from a six-month program at Strategies for Change, where she learned anger management, parenting, and life skills.

She admitted using cocaine when pregnant with the minor, but now has a better understanding of her drug problem. On her own, she has attended 14 parenting classes and completed two different programs. She attends marriage counseling with the father at their church, through their pastor. If the father used cocaine again, she would leave him. The mother claimed she is no longer addicted to cocaine.

The minor enjoys the visits. The mother plays with him, and the minor has a bond with her. She supports placement with the paternal half-sister, as the minor would still be with his family.

The mother testified that she took responsibility for her actions and was trying to change them. As opposed to what happened with her other children, the mother would “fight” and “do whatever it takes” to get her son home with her. She also

told the court that her first two children never should have been removed, as she was a fit mother.

The juvenile court denied the petition for modification, finding the parents' efforts were commendable, but they had not met their burden of establishing changed circumstances or that the petition was in the minor's best interests. The court terminated parental rights, finding the parent-child bond exception to adoption did not apply.

DISCUSSION

I

Appellants contend the juvenile court abused its discretion in denying their petitions for modification because the evidence established both a change in circumstances and the proposed order was in the minor's best interests. In addition, the father claims the juvenile court should have granted the petition because it erroneously denied visitation when he was incarcerated in jail. We disagree.

A.

A parent may bring a petition for modification of any order of the juvenile court pursuant to section 388 based on new evidence or a showing of changed circumstances. "The parent requesting the change of order has the burden of establishing that the change is justified. [Citation.] The standard of proof is a preponderance of the evidence. [Citation.]" (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Determination of a petition to modify is committed to the sound discretion of the juvenile court and, absent a showing of a clear abuse of

discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) The best interests of the child are of paramount consideration when the petition is brought after termination of reunification services. (*Id*. at p. 317.) In assessing the best interests of the child, the juvenile court looks not to the parents' interests in reunification but to the needs of the child for permanence and stability. (*Ibid.*; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

In ruling on the petition for modification, the juvenile court may consider: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531-532.)

Both parents have serious problems which led to the dependency -- domestic violence and drug abuse. The father has 13 drug-related convictions between 1986 and 2008, and already failed Proposition 36 probation. The 22-year-old mother admitted using cocaine since age 20, and used the drug daily when pregnant, causing the minor to test positive for the drug at birth. They met through drugs, and engaged in domestic violence while high. Clearly, their drug use presented a substantial danger to the minor.

As of the May 2009 hearing on their petition, the parents claimed to have been been sober since September 2008. Even to

the extent that was true, where a parent has a history of addiction, eight months of sobriety is insufficient evidence to establish the changed circumstance of having successfully turned over a new leaf. (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423-424; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47-49; see *Kimberly F., supra*, 56 Cal.App.4th at p. 531, fn. 9 [must be much longer than 120 days "to show real reform"].) While the parents' efforts are commendable, it is still too early for them to carry their burden of proving changed circumstances. "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*In re Casey D., supra,* 70 Cal.App.4th at p. 47.)

Although the minor enjoyed his visits, the infant never lived with the parents, at most seeing them for no more than two hours a week. The parents do love the minor, but the strength of their bond does not warrant granting the petition. Given the absence of evidence of changed circumstances and the nature of the bond between the parents and the minor, the juvenile court's resolution on these facts is reasonable, so we cannot find an abuse of discretion.

B.

We also reject the father's contention that the juvenile court's no contact order for him while he was in jail was

improper, and this error mandated granting his petition for modification.

The father made one request for visitation while incarcerated. At the dependency hearing, father's counsel told the juvenile court: "And my client . . . definitely want[s] to be able to visit with his baby. If the Court doesn't grant him visitation while he's in custody, then he's asking for a visitation order upon release." The juvenile court issued a no contact order for the father, with visitation upon his release.

The father never objected to this order, or sought to modify it through a petition for modification. "A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court. [Citations.] Forfeiture, also referred to as 'waiver,' applies in juvenile dependency litigation and is intended to prevent a party from standing by silently until the conclusion of the proceedings." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221- 222.) His failure to object to or petition to modify the order in light of his extended incarceration forfeits the father's claim on appeal.

The claim also fails on the merits. When the father asked for visitation, counsel told the court he would be released around December 1, slightly less than one month from the detention hearing. At the time, the infant was a few weeks old, having been born with syphilis and testing positive for cocaine. The juvenile court was well within its discretion to deny visitation at jail with an infant in the minor's condition.

Although the father was incarcerated for longer than the one month suggested by trial counsel, he never sought modification of the no contact order in light of his extended incarceration.

Even if the juvenile court had allowed the minor to visit, the few extra months of visitation would not have established a sufficient change in circumstances or benefit to the child to justify granting the petition for modification. The father's claim is devoid of merit.

II

The father contends the juvenile court erred by failing to find an exception to adoption based on his beneficial relationship with the minor. We disagree.

The parent has the burden of establishing an exception to termination of parental rights. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) "Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

The juvenile court's ruling declining to find an exception to adoption must be affirmed if it is supported by substantial evidence. (*In re Zachary G., supra*, 77 Cal.App.4th at p. 809.) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all

conflicts in support of the order. [Citations.]" (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

Section 366.26, subdivision (c)(1)(B)(i), provides an exception to adoption when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

However, a parent may not claim this exception "simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights." (*In re Jasmine D., supra,* 78 Cal.App.4th at p. 1349.) The benefit to the child must promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.)

The father cites *In re Brandon C.* (1999) 71 Cal.App.4th 1530 in support of his claim. There, the juvenile court found it was in the best interests of the minors to establish a guardianship, rather than terminate parental rights, so the minors could maintain their relationship with their mother.

(*Id.* at p. 1533.) Affirming, the Court of Appeal held substantial evidence supported the juvenile court's conclusion that terminating parental rights would be detrimental to the minors, since their mother had maintained regular, beneficial visitation with them. (*Id.* at pp. 1537-1538.)

In re Brandon C., supra, 71 Cal.App.4th 1530, is distinguishable from the proceedings here. The Court of Appeal in *Brandon C.* found ample evidence of benefit to the minors of continued contact with their mother. (*Id*. at pp. 1537-1538.) Here, by contrast, and contrary to the father's claim, the record supports the juvenile court's conclusion there would not be sufficient benefit to the minor if the relationship with appellants were to continue.

As we have already discussed, while the parents loved the minor and he enjoyed their presence, their relationship was comparatively brief -- weekly two hour visits with an infant who never lived with them. While the minor appeared to recognize the parents, the visits ended without incident and he easily returned to the foster parents. The minor also had a prospective adoptive parent, his paternal half-sister, who was approved for out-of-state placement.

The issue is whether, after it became apparent that the parents would not reunify with the minor, an "exceptional situation existed to forego adoption." (*In re Autumn H.,* supra, 27 Cal.App.4th at p. 576.) The father had the burden to demonstrate the statutory exception applied. With all of the evidence regarding the nature of the relationship between

appellant and the minor before it, the juvenile court concluded that the father failed to make such a showing. We agree with that conclusion. (See *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.) The court did not err in terminating parental rights.

III

Finally, the father contends DHHS and the juvenile court failed to comply with the notice requirements of the ICWA. He is mistaken.

ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(1), 1911(c), 1912.) If, after the petition is filed, the juvenile court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the BIA if the tribal affiliation is not known. (25 U.S.C. § 1912; § 224.2; Cal. Rules of Court, rule 5.481(b).)

To assist a tribe in making its determination of whether the child is eligible for membership and whether to intervene, the agency should provide the following information if it is known: the name and date of birth of the child; the tribe in which membership is claimed; the names, birthdates, current addresses, and tribal enrollment numbers of the parents, grandparents, and great-grandparents of the child, and the

places of their birth and death if applicable. (§ 224.2; *In re D.T.* (2003) 113 Cal.App.4th 1449, 1454-1455.)

The father first claimed Indian heritage with an unknown tribe, but subsequently indicated his tribal heritage was either unknown or possibly Blackfeet, identifying the paternal great-grandmother as an Indian parent. On November 13, 2008, DHHS notified the BIA and the Blackfeet Tribe of the father's claim. The paternal great-grandmother was identified by name, with unknown tribal membership. Attached to the notice was an Indian ancestry questionnaire completed by the father, which identified the paternal great-grandmother as having "unknown possible Blackfoot" heritage.

After the November 13 notice, the father told the DHHS the notice was inaccurate as it did not indicate possible Blackfeet heritage for the paternal great-grandmother. DHHS then sent a letter to the Blackfeet Tribe and the BIA regarding the November 13 notice, stating the father: "reviewed the notice and indicated page 5 of 10 should be corrected to show the paternal great grandmother . . . is Blackfeet as well. Please make this correction to your records and determine eligibility based thereon." The Blackfeet Tribe subsequently replied that the minor and the parents did not have tribal heritage.

The father argues no notice was entirely correct, and there is no evidence the tribe or the BIA "actually have the administrative capacity, motivation, or duty to match up defective notices with later sent correction letters." He also

claims that the Blackfeet Tribe's rejection letter shows the possible paternal Indian heritage was never investigated.

The November 13th notice identifies the paternal great-grandmother by name, with unknown tribal affiliation. The correction letter does not tell the Blackfeet Tribe or the BIA to ignore the notice, merely giving the additional information that father claims Blackfeet heritage "as well[.]" Read together, the notice and the letter inform the relevant parties that the paternal great-grandmother had possible Blackfoot or unknown Indian heritage. This is what the father told DHHS, and the ICWA requires no more.

The father's contention that the Blackfeet Tribe and the BIA did not investigate this information and lacked the capacity to address the correction letter is speculation with no support in the record. DHHS satisfied the notice provisions of the ICWA and we reject the father's claim to the contrary.

DISPOSITION

The orders of the juvenile court are affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

RAYE, J.